

STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of:

Badjr Transportation, Inc.
10575 Banana Avenue
Fontana, California 92337
EPA ID # CAR000094664;

Bernard A. DeKay
12384 Baker Avenue
Chino, California 91710

Respondents

HWCA No. 01/02-3011

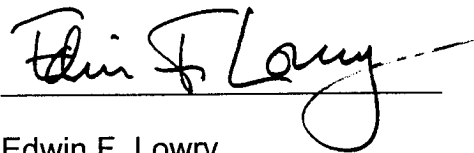
OAH No. L-2002050105

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Toxic Substances Control as its Decision in the above-entitled matter.

This Decision shall become effective 30 days after service.

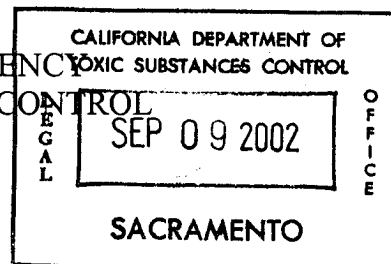
IT IS TO BE ORDERED September 24, 2002.



Edwin F. Lowry

Director

BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA



In the Matter of:

BADJR TRANSPORTATION, INC.,
10575 Banana Avenue
Fontana, CA 92337

EPA ID #CAR000094664

And

BERNARD A. DeKAY,

Respondents

Case No. HWCA 01/02-3011

OAH No. L2002050105

PROPOSED DECISION

Administrative Law Judge M. Amanda Behe, Office of Administrative Hearings, State of California, heard this matter on July 18 and 19, 2002, in Los Angeles, California.

Thomas C. Heller, Counsel, Deputy Attorney General, represented the Department of Toxic Substances Control.

David McDonnell, Attorney at Law, represented respondent BADJR Transportation, Inc. At hearing respondent BADJR Transportation, Inc., entered into a stipulation with the Department regarding the Enforcement Order.

Respondent Bernard A. DeKay represented himself.

Evidence was presented and the record remained open for receipt of electronic copies of the Enforcement Order and the Department of Toxic Substances' Hearing Brief. Thereafter the record was closed and the matter submitted.

FACTUAL FINDINGS

1. The State of California Department of Toxic Substances Control (hereinafter "the Department") has responsibility to enforce the Hazardous Waste Control Law (herein "the HWCL"), Health and Safety Code section 25100 et seq., and the implementing regulations promulgated in California Code of Regulations, Title 22, section 66260.10 et seq.

2. Health and Safety Code section 25187 authorizes the Department to order action necessary to correct violations and assess a penalty when the Department determines that a person has violated specified provisions of the Health and Safety Code or any permit, rule, regulation, standard, or requirement issued or adopted pursuant thereto.

3. On March 18, 2002, the Department issued Enforcement Order HWCA 01/0 to BADJR Transportation, Inc. (hereinafter "respondent BADJR") and Bernard A. DeKay (hereinafter "respondent DeKay").

4. On March 29, 2002, respondent DeKay, on behalf of respondent BADJR and himself, filed a timely and proper Notice of Defense. Pursuant to Health & Safety Code section 25187(d)(1)(e) the matter was set for an administrative hearing in accordance with the Administrative Procedures Act, Government Code section 11500 et seq.

5. Respondent BADJR is a California corporation, and a "person" as defined in Health and Safety Code section 25118. Respondent BADJR is a hazardous waste transporter; that term is defined in California Code of Regulations, Title 22, section 66260.10.

At all times relevant to the violations cited in the Enforcement Order respondent BADJR did not hold a valid hazardous waste transporter registration with the State of California.

6. At hearing respondent BADJR stipulated to the Enforcement Order HWCA 01/02-3011 including the assessment of penalties in the amount of \$190,730 against respondent BADJR, and to a factual basis for the Department's investigation. Respondent BADJR further stipulated to the Determination of Violations set forth in paragraphs 2.1 through 2.5, the Schedule for Compliance set forth in paragraphs 3 through 3.13, and the Other Provisions set forth in paragraphs 4.1 through 4.4 of the Enforcement Order.

Subsequent to entering the stipulation respondent BADJR and its counsel left the hearing. The evidentiary hearing continued with regard to respondent DeKay.

7. Respondent DeKay is an individual and at all times relevant to the violations cited in the Enforcement Order was an officer of respondent BADJR. Respondent DeKay is President and partial owner of respondent BADJR.

Respondent DeKay is a "person" as defined in Health and Safety Code section 25118, and an "owner" and "operator" of a hazardous waste transporter as those terms are defined in California Code of Regulations, Title 22, section 66260.10.

8. Paul Baranich is a Department Senior Scientist whose job responsibilities include working with law enforcement and other agencies. He described the Department's responsibility for assuring proper handling, transport, storage and disposal of hazardous waste "from the cradle to the grave." Hazardous waste is discarded material which is toxic, corrosive, ignitable, reactive, or otherwise dangerous within the meaning of California Code of Regulations, Title 22, section 66261.

9. Mr. Baranich's investigations have included monitoring of compliance with manifest requirements, which provide data to enable the Department to track hazardous waste from generation through transportation to disposal. The multi-copy Uniform Hazardous Waste Manifest form (hereinafter "manifest") requires completion of entries regarding the amount and characteristics of hazardous waste, and its generator, transporter(s) and ultimate recipient. The data from a manifest are entered on the Department's HAZMAT system, a database used to track hazardous waste.

Transporters are required to sign and date each manifest and assure that the generator from whom the hazardous waste is received has completed the relevant sections of the form. Mr. Baranich's responsibilities include investigations of the transportation and storage of hazardous wastes including that transporters not hold such waste more than ten days. A full hazardous waste facility permit is required for storage for more than ten days.

10. In mid-July 2001 Mr. Baranich received a tip from the Federal Bureau of Investigation (hereinafter "FBI") that respondents BADJR and DeKay might be storing hazardous waste for longer than ten days at 10575 Banana Avenue, Fontana, California, (hereinafter "the Banana Site"). Mr. Baranich ran the names in the HAZMAT system, and discovered that neither respondent BADJR nor respondent DeKay held a valid hazardous waste transporter registration with the Department.

11. Respondent DeKay is a former employee of the trucking division of Sina Environmental, Inc. (hereinafter "Sina"), a registered hazardous waste transporter. In early 2001 agents of the FBI, the San Bernadino County Fire Department, and the San Bernadino County District Attorney inspected Sina's truck yard at 10756 Calabash Avenue (hereinafter "the Calabash Site") in Fontana and found illegal storage of hazardous waste.

Sina then decided to sell its trucking division. Respondent DeKay planned to purchase the operation and attempted to arrange financing. He filed Articles of Incorporation for respondent BADJR with the Secretary of State's office on April 3, 2001, and named the company after the "CB handle" he used as a trucker. Although Sina's owner did not sign the proposed purchase agreement and the sale was never effected, respondents BADJR and DeKay took over the Calabash Site and business commencing approximately April 30, 2001.

From on or about April 30, 2001, through all dates identified in the Enforcement Order respondents BADJR and DeKay transported hazardous waste without a valid hazardous waste transporter registration issued by the Department.

12. On July 13, 2001, Mr. Baranich and his colleague Rick Jones appeared at the Banana Site to investigate the tip from the FBI. The Banana Site was a truck yard about 1/3 of an acre in size surrounded by a chain link fence. The investigators noted an office building and approximately 40-50 trailers and some truck tractors on the property.

Rick Von Schrader and respondent DeKay identified themselves to the investigators as, respectively, the Vice-President and President of respondent BADJR. They stated that they were buying out Sina. When Mr. Baranich asked for documentation of the transaction respondent DeKay replied that it was a verbal agreement. Respondent DeKay referred to the earlier multi-agency investigation of Sina's storage of hazardous waste as "FBI bullshit."

13. During the July 13, 2001, investigation respondent DeKay admitted that in April 2001 he started operating respondent BADJR at the Calabash Site and moved it a few blocks away to the Banana Site on June 29. Each site was a "transfer facility" within the meaning of Health & Safety Code section 25123.3 (a)(3).

Respondent DeKay admitted to the investigators that neither he nor respondent BADJR held a valid hazardous waste transporter registration with the Department. He claimed to be using Sina's name and registration number pursuant to his planned purchase of Sina. Neither respondent BADJR nor respondent DeKay were employed by or agents of Sina. Neither respondent DeKay nor Mr. Von Schrader were Sina employees; their paychecks were issued by respondent BADJR.

Mr. Baranich warned respondent DeKay that the use of Sina's name and number was not authorized, and that a transporter registration could not be transferred.

14. During the July 13, 2001, investigation Mr. Baranich asked if a load of hazardous waste from Lake Charles, Louisiana, was present at the Banana Site. Respondent DeKay admitted it was and provided a series of manifests and waste profile sheets from a Louisiana generator named "Lake Charles NRG, LLC." The manifests established that the hazardous waste was corrosive, ignitable, and otherwise hazardous material including flammable liquids and oxidizers. Respondents BADJR and DeKay used Sina's name and registration number on all of the manifests.

The investigators observed a 51-foot trailer containing approximately 80 55-gallon drums from Lake Charles NRG. Some of the containers were "over-pack" drums used to hold leaking metal drums. The investigators took samples of the materials in the drums, which was later tested by the Department. The lab tests confirmed that the Lake Charles NRG material was hazardous waste.

The manifests also established that the hazardous waste had been picked up from the generator in Louisiana on June 13, 2001. In response to Mr. Baranich's questions respondent DeKay admitted that the trailer of hazardous waste had been received on June 16 at the Calabash Site and stored there for over ten days. He further admitted that from there the trailer had been moved to the Banana Site on approximately June 29 and stored for two weeks until the date of the investigation, July 13, 2001.

Respondent DeKay's admissions and the manifests established that respondents BADJR and DeKay stored hazardous waste from Lake Charles NRG for substantially more than ten days at both the Calabash Site and at the Banana Site. Respondent DeKay's admissions and the Department's records established that neither he nor respondent BADJR held a valid hazardous waste transporter registration with the Department.

15. During the July 13, 2001, investigation in respondents' office at the Banana Site Mr. Jones observed a stack of manifests which identified Tri-State Environmental Services (hereinafter "Tri-State") as the transporter. The manifests listed hazardous waste that had been received more than a month previously. Respondent DeKay represented that Tri-State was operated by Paul Herrera, a person he had known for some time. He stated that Tri-State was a small company which did not handle out-of-state transportation.

Mr. Herrera operated Tri-State from a desk in respondents' office building at the Banana Site, and also had operated at the Calabash Site. Starting in February 2001 Tina Quesada was employed by Mr. Herrera as bookkeeper for Tri-State at the Calabash Site. Ms. Quesada overheard conversations regarding respondent DeKay's proposed purchase of Sina, and recalled that the deal never went through.

From March until at least September 2001, Ms. Quesada answered respondents' telephones with the identification "Sina." Around the time of the move to the Banana Site her employer was changed from Mr. Herrera to respondents BADJR and DeKay. Ms. Quesada observed that respondent DeKay ran respondent BADJR and was in charge of its day-to-day operations.

16. Robert Gonzales was employed by respondents BADJR and DeKay to transport trailers of hazardous waste, move waste around the Banana Site, and handle some paperwork. Mr. Gonzales credibly testified that respondent DeKay was the "head guy" of respondent BADJR. Mr. Gonzales observed that respondents BADJR and DeKay regularly combined Tri-State waste with respondents' own loads for transportation to other sites on respondent BADJR's trucks.

Mr. Gonzales observed that at both the Calabash and Banana Sites Mr. Herrera brought in drums of hazardous waste about five days per week. He left the drums on the ground or in trailers. Mr. Gonzales often saw those drums sitting in the truck yard and tried to identify the contents for consolidation and transportation by respondents DeKay and BADJR. He frequently could not find the paperwork because Mr. Herrera did not provide documentation of all of the hazardous waste until a trailer was full. No physical separation

was maintained between Tri-State's and respondents' hazardous waste in the Banana Site yard.

Mr. Herrera acknowledged to Mr. Baranich that he brought hazardous wastes to respondent BADJR on or about the delivery dates identified on the manifests found by the investigators. He also acknowledged that respondents DeKay and BADJR stored Tri-State hazardous waste for substantially longer than ten days at both the Calabash and Banana Sites.

The Tri-State hazardous waste at the Banana Site included ignitable paint waste, heavy metal filter cake waste from plating operations, three drums of waste cyanide, an electrical transformer carcass, 55-gallon drums of PCB wastes, and other material. Some of the drums of Tri-State waste were clearly marked with yellow hazardous waste labels, and openly stored on a drop-deck trailer. Respondent DeKay displayed his knowledge of the presence of the Tri-State hazardous waste at the Banana Site by leading the investigators around and pointing out the items on the Tri-State manifests.

The manifests and respondent DeKay's admissions established that respondents BADJR and DeKay accepted hazardous waste from Tri-State, and stored the waste for substantially longer than ten days. Respondents BADJR and DeKay regularly transported Tri-State waste to its manifested destination on respondent BADJR's trucks.

17. On July 25, 2001, Mr. Baranich and Mr. Jones and Special Agent Annette Freihon of the FBI obtained manifests during an investigation at American Recovery, Inc. (hereinafter "ARI") in Alhambra, California. They found eight manifests which named ARI as generator. Seven of the eight manifests listed Sina as transporter #1. The eighth manifest identified A-American Environmental, LLC (hereinafter "A-AE") as transporter #1, but it was signed by Mr. Gonzales, an employee of respondents BADJR and DeKay. All eight manifests stated that the Denova Environmental, Inc. (hereinafter "Denova") was the storage/disposal facility.

During an inspection at Denova Mr. Jones obtained three manifests covering the same ARI waste as in three of the above-referenced set of eight manifests. The three manifests found at Denova stated that A-AE was transporter #2 and received the waste from Sina on July 2, and that Denova received the waste on July 23, 2001.

The Department investigators also obtained a set of four manifests which identified Denova as the generator, Sina as transporter #1, and Custom Environmental Services LTD aka Pro-Eco (hereinafter "Pro-Eco") in Canada as the storage/disposal facility. The generator's certification was ostensibly signed on July 23 by Denova. On July 23, 2001, respondent DeKay signed and dated the four manifests as transporter #1.

18. On July 26, 2001, Mr. Baranich and Mr. Jones with Agent Freihon went to the Banana Site to investigate the location of the ARI hazardous waste. The investigators found Mr. Gonzales there and Mr. Jones asked if they had any trailers of waste parked anywhere

else. Mr. Gonzales said yes and motioned to a truck yard adjacent to the eastern boundary of the Banana Site. Mr. Gonzales said they had three trailers parked in that yard.

Agent Freihon questioned respondent DeKay about the various sets of manifests for the ARI hazardous waste, and showed him a set which indicated respondent BADJR had picked up the waste at ARI on June 18. Respondent DeKay said that respondents tried but were unsuccessful in obtaining permission to ship the waste to Pro-Eco. He admitted that since June 18 three trailers of ARI hazardous waste had been stored at an adjacent truck yard at 14165 Slover Avenue owned by D&M Enterprises¹. The investigators asked why respondent DeKay had not disclosed that waste on their first visit. He replied "You didn't ask." Respondent DeKay stated he obtained a "good deal" on the rent of the adjacent yard.

Respondent DeKay also claimed that the ARI hazardous waste picked up at ARI on June 18 had been subsequently transported by a second firm. Respondent DeKay represented that Charles Richardson of C&L Transportation took the three trailers to Denova, and signed the manifests as an additional transporter. Mr. Baranich specifically asked respondent DeKay if Charles Richardson and C&L held a valid transporter registration, and he answered "Yes." His representation was false; neither Charles Richardson nor C&L Transportation held a valid transporter registration.

Agent Freihon then asked respondent DeKay for the original manifests for the ARI hazardous waste. He falsely claimed that there were no manifests prior to the forms reflecting the movement of the waste from ARI to Denova. Agent Freihon then showed respondent DeKay the original set of manifests discovered during the investigation at ARI the preceding day. Respondent DeKay then admitted that the manifests covered the same ARI hazardous waste. He claimed to have "remanifested" the waste stored at the adjacent yard with manifests that stated different and later dates of origin from the generator as well as different and later dates of receipt. Respondent DeKay admitted that respondents were operating as a hazardous waste storage facility.

Mr. Gonzales picked up hazardous waste from ARI and transported it to respondent BADJR and DeKay's Banana Site. He testified that the ARI hazardous waste was stored at the Banana Site and the adjacent yard for "quite some time, about six weeks."

19. Respondents BADJR and DeKay made false statements on manifests to conceal their illegal storage of ARI hazardous waste. Eight original manifests established that on May 29, 30, and 31 and on June 4, 2001, respondents transported hazardous waste from generator ARI to their Calabash Site. The ARI waste remained there until about June 29 when it was moved to the Banana Site. Respondents BADJR and DeKay then moved the waste to an adjacent rented yard and stored it there until July 26, 2001.

¹ D&M Enterprises was owned by Dick and Mary Schreiber. Neither D&M Enterprises nor the Schreibers held a valid hazardous waste transporter registration with the Department.

On June 18, 2001, respondents BADJR and DeKay replaced original manifests for the ARI waste with eight falsified manifests and continuation sheets. The forms falsely represented the dates the waste was shipped from the generator, ARI. Respondents BADJR and DeKay also falsely represented on the forms that the waste had been in transit on dates when it was in storage at respondents' yards. Charles Richardson of C&L Transportation was identified on the falsified manifests as a transporter although he had not taken custody of or transported the ARI waste.

In a willful effort to conceal the violation of the ten-day storage limit, respondents BADJR and DeKay fabricated and disseminated manifests that represented the ARI hazardous waste had been moved and returned on dates when it was in storage. Respondent DeKay signed the manifests which falsely stated that the trailers of ARI waste had been transported by Sina to Denova and were returned by Denova for transport to Pro-Eco. None of the claimed movement of the three trailers of ARI waste occurred. The waste remained stored by respondents BADJR and DeKay at the rented truck yard at 14165 Slover Avenue. Respondents BADJR and DeKay, rather than Sina, stored the ARI waste and respondent DeKay signed all the manifests.

The manifests, Mr. Gonzales' testimony, and respondent DeKay's admissions established that respondents stored ARI hazardous waste for substantially longer than ten days. In sum, at the Calabash Site respondents BADJR and DeKay stored ARI hazardous waste received on May 29 for 32 days, waste received on May 30 for 31 days, waste received on May 31 for 30 days, and waste received on June 4 for 26 days. At the Banana Site and adjacent yard respondents BADJR and DeKay stored the ARI hazardous waste 28 days from June 29 to July 26, 2001.

20. During the July 26, 2001, investigation the Department investigators granted respondent DeKay's request to move the trailers of ARI hazardous waste from the adjacent yard to the Banana Site. Respondent DeKay did not want to jeopardize his low rent for the adjacent yard due to the Department's quarantine of the waste.

Mr. Baranich observed that the trailers contained numerous drums, including many with labels which identified ARI as the generator. Mr. Gonzales stated that one drum, which had an ARI label that it contained "fixer developer," had to be repacked because it was leaking. When the trailer holding that repacked drum was opened the investigators noticed a very strong chemical smell. They left the area until the smell dissipated. The label on another drum identified the generator as the VA Medical Center.

21. In August 2001 Glenn Forman, a Hazardous Substance Scientist with the Department, assisted with the identification of the ARI hazardous waste stored by respondents BADJR and DeKay. Mr. Forman described that "practically all" of the containers of waste were mislabeled, which posed a risk of unsafe handling and inappropriate storage of the material.

The ARI hazardous waste included explosive materials so unstable and dangerous that transportation was not feasible. On the recommendation of the Bomb Squad of the San Bernardino County Sheriff's Department those materials were detonated at the Banana Site. That controlled detonation required notification of nearby businesses and an airport, closing the adjacent street, evacuation of residents, and considerable safety measures.

22. On August 20, 2001, respondent DeKay contacted Mr. Baranich and stated that he wanted to "come clean." He admitted that to conceal violations of the ten-day storage limit he made false manifests and continuation sheets, and untruthfully represented that the ARI waste had been removed and returned. He admitted that the ARI hazardous waste was continuously stored from June 18 through July 26, and that his claims it had been moved were false.

23. Allison Saldana is a Hazardous Substances Scientist with the Department. She used the Department's HAZMAT manifest database to investigate the use of Sina's name and transportation registration by respondents BADJR and DeKay. The HAZMAT database established that respondents used Sina's name and registration number on 109 manifests from May through August 2001.

24. The HAZMAT system also established that respondents BADJR and DeKay stored hazardous waste in excess of thirteen days on at least fourteen occasions. Ms. Saldana noted that she excluded from her calculations all manifests which indicated transportation of the waste over a long distance or involvement of a second transporter.

Respondents BADJR and DeKay stored 330 gallons of oil and water listed on manifest No. 20823758 for 2 days at the Calabash Site and 13 days at the Banana Site. Respondents BADJR and DeKay stored 1800 pounds of grinding sludge listed on manifest No. 20823760 for 55 days at the Calabash Site and 14 days at the Banana Site. Respondents BADJR and DeKay stored 2000 pounds of grinding sludge listed on manifest No. 20823823 for 22 days at the Calabash Site and 14 days at the Banana Site.

Respondents BADJR and DeKay stored 55 gallons of mineral spirits and water listed on manifest No. 20823824 for 13 days at the Calabash Site and 13 days at the Banana Site. Respondents BADJR and DeKay stored 1800 pounds of grinding sludge listed on manifest No. 20823833 for 14 days at the Calabash Site and 14 days at the Banana Site.

25. James McCammon is a Senior Hazardous Substances Scientist with the Department. His responsibilities include recommendations regarding policy issues and enforcement of the HWCL including penalties assessed pursuant to Health and Safety Code section 25187. Mr. McCammon considered reports identifying violations by respondents BADJR and DeKay in relation to the statutory and regulatory factors for determination of penalties.

Mr. McCammon considered Health and Safety Code section 25189 (a)(2) which provides that the appropriate penalty amount in any given case depends on "the nature,

circumstances, extent, and gravity of the violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the proposed penalty, and the prophylactic effect that the imposition of the proposed penalty would have on both the violator and the regulated community as a whole." He calculated the penalty against respondents as described in California Code of Regulations, Title 22, sections 66272.60 through 66272.69.

Mr. McCammon testified that the Department customarily uses the middle value of the range of penalties for a particular violation. Pursuant to the Department's usual practice he considered the number of times respondents committed a violation, and the gravity and extent of the violation. to establish an initial penalty. He then adjusted those values by factors of intent, economic benefit, cooperation, the prophylactic effect of the penalty, ability to pay, etc. Mr. McCammon prepared a table which identified the statutory and regulatory considerations in relation to the facts of the case. His recommendations were reviewed for consistency with comparable cases and for appropriateness by a panel of Department managers. The approved penalty sums were incorporated in the Enforcement Order.

26. With regard to the falsified manifests Mr. McCammon testified that the penalty is \$25,000 per violation for making a false statement or representation on any manifest. Respondents BADJR and DeKay made false statements on numerous manifests and substituted false manifests to conceal multiple violations of the ten-day storage limit. Respondents' actions were intentional, obviated the purposes of the HAZMAT system, and demonstrated a strong intent to deceive. The statutory maximum penalty for such violations was \$325,000. The Department imposed a penalty of \$66,000 after considering the relevant penalty factors. Mr. McCammon persuasively testified that a \$66,000 penalty for respondents' falsification of manifests was appropriate.

27. Mr. McCammon testified that the penalty is \$25,000 per violation for illegal storage of hazardous waste. The investigation established that from April through late July 2001 respondents BADJR and DeKay repeatedly stored hazardous waste for more than ten days without authorization, which would merit a maximum penalty of more than \$1,500,000. Mr. McCammon considered the potential for harm was major given the large amounts and the nature of the subject hazardous wastes, and that the conduct was intentional. Mr. McCammon persuasively testified that a \$93,320 penalty for respondents' illegal storage of hazardous waste was appropriate.

28. With regard to the transporter registration requirement Mr. McCammon testified that the penalty is \$25,000 per violation for that strict liability offense. Respondents BADJR and DeKay transported at least 122 manifested loads of hazardous waste while not registered with the Department. The maximum penalty for those violations would be \$3,050,000. The Department determined to treat respondents' actions as a single repeated violation, and set the penalty at \$15,750.

On 130 occasions respondents BADJR and DeKay illegally used Sina's name and non-transferable registration. For those activities the maximum penalty was \$3,250,000, but

the Department imposed a penalty of \$15,750 by considering the multiple actions as a single repeated violation.

Mr. McCammon persuasively testified that considering operating without a registration and using Sina's name and registration number as single repeated violations by respondents DeKay and BADJR was appropriate.

Mr. McCammon noted that respondents BADJR and DeKay displayed an affirmative intent to violation the law. No adjustments were made on the basis of enforcement history because respondent BADJR was a new firm. Neither respondent DeKay nor respondent BADJR displayed extraordinary cooperation or an effort to obstruct justice. In consequence, the proposed penalties were not further adjusted for the latter factors.

29. No information regarding ability to pay was received from respondents BADJR or DeKay. In a conversation with Mr. McCammon respondent DeKay claimed he could not pay any penalty because he had filed bankruptcy. Mr. McCammon directed that he provide documentation of that claimed bankruptcy and related inability to pay a penalty. The only proof of bankruptcy respondent DeKay furnished was four years old², and did not establish his current ability to pay an assessed penalty.

Respondent DeKay refused to provide his tax returns when that information was requested to determine his current ability to pay a penalty. His testimony that he does not think tax returns are a "fair indication" of his financial status was not credible or persuasive.

30. Mr. McCammon testified that the \$190,730 penalty was imposed on the corporate respondent and on its main officer as permitted by the HWCL and the Department's regulations³. Respondent BADJR engaged in numerous serious violations of the HWCL and related regulations.

As President of respondent BADJR with control and decision-making authority, respondent DeKay was responsible for compliance with the HWCL and related regulations. As President of respondent BADJR he decided to operate without a valid registration, to misrepresent operations under Sina's registration and name, to falsify manifests, to lie to investigators, and to make decisions regarding the corporation's illegal storage of hazardous waste. He authorized, directed and participated in the violations of the HWCL committed by respondent BADJR.

In light of respondent DeKay's personal responsibility for the violations set forth in the Enforcement Order the Department's imposition of the penalties against both respondents

² Bernard Alfred DeKay, Jr., was the subject debtor in a bankruptcy proceeding in the United States Bankruptcy Court for the Central District of California, Case No. SA98-14307-JB. Respondent sent the 1998 "Discharge of Debtor" order on a date not identified in the record. The copy he forwarded was not a certified record.

³ The HWCL holds "any person" who commits a violation liable for penalties. Health & Safety Code sections 25189 and 25189.2. "Person" is defined broadly to include a corporation, as provided in Health & Safety Code section 25118.

was appropriate. Mr. McCammon persuasively testified that the \$190,730 penalty was reasonable in light of the serious and repeated illegal conduct by respondents DeKay and BADJR.

31. Respondent DeKay argued that there were "extenuating circumstances" in the case and that imposing fines on him was not justified. Respondent DeKay testified that Robert Cole, a financial backer for respondent BADJR, was responsible for his involvement with ARI. He further claimed that "bigger names out there" were "the actual responsible parties." His testimony was not credible. Respondent DeKay's admissions to investigators and the testimony of Ms. Quesada and Mr. Gonzales established that he was the individual responsible for the operation of respondent BADJR and fully participated in the violations noted in the Enforcement Order. Respondent DeKay admitted at hearing that he was at the yard every day and responsible for the operation of respondent BADJR.

32. Respondent DeKay had 21 years of experience in the hazardous waste business before his effort to purchase Sina's trucking division. In light of that experience his claim that he thought respondents could use Sina's name and transporter registration was wholly lacking in credibility. His testimony that he did not see what was wrong with the practice was wholly lacking in credibility in light of his knowledge of the hazardous waste industry. Moreover, if he had held such an erroneous view, he was warned by Mr. Baranich that registrations are not transferable. Respondents DeKay and BADJR continued to use Sina's name and transporter registration after that warning. Respondents also continued to have Ms. Quesada answer their telephones using the name Sina.

Respondent DeKay's testimony that he was a "leased employee" of Sina was not credible, and was not supported by the evidence.

Respondent DeKay's claim that Sina agreed respondent BADJR could use its name and transporter registration was not credible. He was not a neophyte and with 21 years experience knew that private parties could not obviate the Department's permit process by an ostensible private transfer of a registration. Respondent DeKay acknowledged his motivation in closing argument when he observed that obtaining a transporter registration was expensive and took six months.

33. Respondent DeKay testified that he was "open" and "more than cordial" to the Department's investigators. His view that he was so cooperative that the penalty should be excused or reduced was not supported by the evidence. Respondent DeKay concealed the presence of hazardous waste at an adjacent yard and falsified documents. He admitted that in July 2001 he lied that the false manifests were the true original manifests for loads of hazardous waste. He did not recant his dishonesty until weeks later, after the investigators had independently established his guilt.

34. Respondent argued that he should not be responsible for Tri-State's actions because they were "responsible for their own waste." The violations in which respondents BADJR and DeKay engaged included transporting Tri-State waste and storing it at sites

under respondents' control. Respondent DeKay admitted that he frequently found Tri-State waste without paperwork at the Banana Site. He nonetheless permitted Mr. Herrera to continue to store hazardous waste at the Banana Site, and was rewarded by services from Mr. Herrera who picked up waste for respondents. Respondents BADJR and DeKay have not been charged with or held accountable for Tri-State's wholly separate violations of the HWCL.

35. The totality of evidence established that respondents BADJR and DeKay are jointly and severally liable for the \$190,730 penalty pursuant to the HWCL and the Department's regulations.

LEGAL CONCLUSIONS

A preponderance of the evidence established cause for imposition of Enforcement Order HWCA 01/02-3011 against respondents BADJR and DeKay for violation of Health and Safety Code sections 25189(a), 25201(a), and 25163(a).

ORDER

Enforcement Order HWCA 01/02-3011 IS AFFIRMED. Immediately upon the effective date of this Decision, respondents BADJR Transportation, Inc., and Bernard A. DeKay shall comply with the Schedule For Compliance, Other Provisions, and Penalty as follows:

1. Respondents shall completely and accurately complete the information required on manifests.
2. Respondents shall not transport hazardous waste within the State of California unless respondents have obtained and hold a valid hazardous waste hauler registrations from the Department.
3. Respondents shall not hold hazardous waste longer than allowed by California Code of Regulations, Title 22, section 66263.18 without authorization from the Department.
4. All submittals from respondents pursuant to Enforcement Order HWCA 01/02-3011 shall be sent simultaneously to:

Kit Davis, Branch Chief
Task Force Support and Special Investigations Branch
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826-3200

and

Phillip Blum, P.E., Unit Chief
Task Force Support and Special Investigations Branch
1011 North Grandview Avenue
Glendale, California 91201

5. All approvals and decisions of the Department made regarding submittals and notifications will be communicated to respondents in writing by the Branch Chief, Department of Toxic Substances Control, or his/her designee. No informal advice, guidance, suggestions, or comments by the Department regarding reports, plans, specifications, schedules, or any other writings by respondents shall be construed to relieve respondents of the obligation to obtain required formal approvals.
6. If the Department determines that any report, plan, schedule, or other document submitted for approval pursuant to Enforcement Order HWCA 01/02-3011 fails to comply with that Order or fails to protect public health or safety or the environment, the Department may:
 - a. Modify the document as deemed necessary and approve the document as modified, or
 - b. Return the document to respondents with recommended changes and a date by which respondents must submit to the Department a revised document incorporating the recommended changes.
7. Respondents shall carry out Enforcement Order HWCA 01/02-3011 in compliance with all local, State, and federal requirements, including but not limited to requirements to obtain permits and to assure worker safety.
8. In the event that the Department determines that any circumstances or activity (whether or not pursued in compliance with Enforcement Order HWCA 01/02-3011) is creating an imminent or substantial endangerment to the health or welfare of people on the site or in the surrounding area or to the environment, the Department may order respondents to stop further implementation of the Order for such period of time as needed to abate the endangerment. Any deadline in Enforcement Order HWCA 01/02-3011 directly affected by a Stop Work Order under this section shall be extended for the term of the Stop Work Order.
9. Nothing in Enforcement Order HWCA 01/02-3011 shall constitute or be construed as a satisfaction or release from liability for any conditions or claims arising as a result of past, current, or future operations of respondents. Notwithstanding compliance with the terms of the Order respondents may be required to take further actions as are necessary to protect public health or welfare or the environment.
10. Access to the site shall be provided at all reasonable times to employees, contractors, and consultants of the Department, and any agency having jurisdiction. Nothing in Enforcement Order HWCA 01/02-3011 is intended to limit in any way the right of entry or

inspection that any agency may otherwise have by operation of any law. The Department and its authorized representatives shall have the authority to enter and move freely about all property at respondent's sites at all reasonable times for purposes including but not limited to: inspecting records, operating logs, and contracts; reviewing the progress of respondents in carrying out the terms of the Order; and conducting such tests as the Department may deem necessary. Respondents shall permit such persons to inspect and copy all records, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to the Order.

11. Respondents shall permit the Department and its authorized representatives to inspect and copy all sampling, testing, monitoring, and other data generated by respondents or on respondents' behalf in any way pertaining to work undertaken pursuant to Enforcement Order HWCA 01/02-3011. Respondents shall allow the Department and its authorized representatives to take duplicates of any samples collected pursuant to the Order. Respondents shall maintain a central depository of the data, reports, and other documents prepared pursuant to the Order. All such data, reports, and other documents shall be preserved by respondents for a minimum of six years after the conclusion of all activities under the Order. If the Department requests that some or all of these documents be preserved for a longer period of time, respondents shall either comply with that request, deliver the documents to the Department, or permit the Department to copy the documents prior to destruction. Respondents shall notify the Department in writing at least six months prior to destroying any documents prepared pursuant to the Order.

12. The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by respondents or related parties in carrying out activities pursuant to Enforcement Order HWCA 01/02-3011, nor shall the State of California be held as a party to any contract entered into by respondents or its agents in carrying out activities pursuant to the Order.

13. All plans, schedules, and reports that require Department approval and are submitted by respondents pursuant to Enforcement Order HWCA 01/02-3011 are incorporated in the Order upon approval by the Department.

14. If respondents are unable to perform any activity or submit any document within the time required under Enforcement Order HWCA 01/02-3011, respondents may, prior to expiration of the time, request an extension of time in writing. The extension request shall include a justification for the delay. If the Department determines that good cause exists for an extension, it will grant the request and specify in writing a new compliance schedule.

15. By issuance of Enforcement Order HWCA 01/02-3011, the Department does not waive the right to take further enforcement actions.

16. Failure to comply with the terms of Enforcement Order HWCA 01/02-3011 may also subject respondents to costs, penalties, and/or punitive damages for any costs incurred by the

Department or other government agencies as a result of such failure, as provided by section 25188 and other applicable provisions of law.

17. Enforcement Order HWCA 01/02-3011 shall apply to and be binding upon respondents, and its officers, directors, agents, employees, contractors, consultants, receivers, trustees, successors, and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations.

18. "Days" for purposes of Enforcement Order HWCA 01/02-3011 means calendar days.

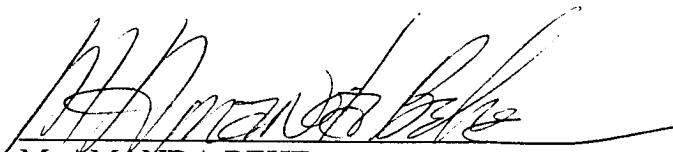
19. Respondents BADJR and DeKay shall pay a penalty at \$190,730 within 30 days from the effective date of this Decision by check made payable to the Department of Toxic Substances Control. The penalty payment shall note Docket Number HWCA 01/02-3011 and be delivered to:

Department of Toxic Substances Control
Accounting Office
1001 I Street, 23rd floor
P. O. Box 806
Sacramento, California 95812-0806

A photocopy of the check shall be sent to:

Kit Davis, Branch Chief
Task Force Support and Special Investigations Branch
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826-3200

Dated: August 30, 2002


M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings